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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 85

GUY PORTER GILLETTE, PETITIONER

v.

UNITED STATES OF AMERICA

No 325

LOUIS A. NEGRE, PETITIONER

v.

STANLEY R. LARSEN, COMMANDING GENERAL, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The decision of the court of appeals in No. 85 is reported at 420 F. 2d 298; the decision of the court of appeals in No. 325 is reported at 418 F. 2d 908. The decisions of the district courts are unreported.

JURISDICTION

The judgment of the court of appeals in No. 85 was entered on January 9, 1970, and the petition for a writ of certiorari was filed on February 11, 1970. The judgment of the court of appeals in No. 325 was entered on November 6, 1969, and the petition for a writ of certiorari was filed on February 5, 1970. Both petitions were granted on June 29, 1970. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Military Selective Service Act, and the corresponding military regulations, provide exemptions from combatant or other military service for "selective" conscientious objectors, whose scruples relate only to a particular conflict and not to war in any form.

2. Whether the legislative judgment not to excuse "selective" conscientious objectors violates the principles of religious neutrality and equal protection underlying the First and Fifth Amendments.

STATUTE INVOLVED

50 U.S.C. App. (Supp. V) 456(j), § 6(j), provides:

> Nothing contained in this title * * * shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form * * * Any person claiming exemption from combatant training and service because

> of such conscientious objections * * * shall, if he is inducted into the armed forces * * * be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of induction, be ordered * * * to perform * * * civilian work contributing to the maintenance of the national health, safety, or interest * * *.

STATEMENT

No. 85

After a jury trial in the United States District Court for the Southern District of New York, petitioner Gillette was convicted of having wilfully refused to report for induction as ordered, in violation of 50 U.S.C. App. (Supp. V) 462. He was sentenced to two years' imprisonment.

Gillette originally registered with his local board in Yonkers, New York on March 4, 1964. After working as a photographer's assistant for one year, he became a full-time student at the Neighborhood Playhouse School of the Theatre in New York City, studying for two years to become an actor.

On April 29, 1967, petitioner wrote his local board to request SSS Form 150, the special application form for conscientious objectors. He stated (G. App. 23) that he was requesting an exemption because "I believe that the United States Government is using all the brutal instruments of modern war against a poor peasant population which simply claims the right to have a government of its own free choice."

Alluding to "the Treaty of London of 1945 (Nuremberg Charter) which outlaws the 'waging of a war of aggression,' " he stated that "I object to any assignment in the United States Armed Forces while this unnecessary and unjust war is being waged, on the grounds of religious belief specifically 'Humanism' " (*ibid.*). Subsequently, in response to the question in Form 150 as to the circumstances under which he believed in use of force, petitioner wrote as follows (G. App. 26).

> For the personal protection of self and other individual persons.
>
> To enforce a decision by a majority of the United Nations, against a country accused of breaking the peace, or the direct defense of my country.

A supporting letter from a clergyman indicated that petitioner's beliefs were "primarily related to the war efforts in which our country is now engaged" (G. App. 33), and that he was sincere in those beliefs (*ibid*). Another supporting letter noted that there was "absolutely no doubt in [the writer's] mind that [petitioner] loves his country and that he would defend it." (G. App. 38). At a personal appearance granted by the local board, petitioner stated, according to the minutes, that "his conscience would not let him fight in Vietnam" and that "he could not honestly say he would not defend his country if it were attacked" (G. App. 44).

The local board concluded that Gillette was "opposed to military service in the case of the Vietnam

War" (*ibid.*), and the district court found a "basis in fact for the board concluding that whatever moral views were held they were directed to the Vietnam war * * * (G. App. 13). In affirming the conviction for failure to report, the court of appeals, *per curiam,* concluded that the "[e]vidence derived from Gillette's selective service file and from his testimony before [District] Judge Wyatt reveals that Gillette's beliefs were based on humanism and were specifically directed against the war in Vietnam." (G. App. 20).

The court of appeals held that petitioner's selective objection did not qualify him for conscientious objector status since, "[e]ven assuming that his views were 'religious' as that word is construed to insure the constitutionality of the Act, the Act requires opposition 'to participation in war in any form'." (G. App. 21).

No. 325

Petitioner Negre was inducted into the Army in August 1967. In February 1968, after receiving his basic training, he was ordered to duty in Vietnam. He then filed an application for discharge as a conscientious objector pursuant to Department of Defense Directive 1300.6 and implementing Army regulations.[1] The application was denied, as was his petition in the district court for a writ of habeas corpus.

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[1] These regulations prescribe the same standards for determining conscientious objector status as those applied by the Selective Service System pursuant to 50 U.S.C. App. (Supp. V) 456(j) (see *infra* pp. 13–14).

Petitioner, a Catholic, based his application on the basic principle, stated by a Catholic chaplain, that "[e]ach Catholic must form his own conscience in respect of military service. Thus, one Catholic may serve in good conscience, while another Catholic will find that his conscience prohibits military service. Under Catholic religious training and belief, each Catholic has a duty to follow his own conscience in respect of military service" (N. App. 4). His application adopted portions of the Pastoral Constitution of the Church in the Modern World (December 7, 1965)[2] (N. App. 8–9), as follows:

> (Sec. 79) But it is one thing to undertake military action for the just defense of the people, and something else again to seek the subjugation of other nations. Nor does the possession of war potential make every military or political use of it lawful. * * *
>
> (Sec. 80) The horror and perversity of war are immensely magnified by the multiplication of scientific weapons. For acts of war involving these weapons can inflict massive and indiscriminate destruction far exceeding the bounds of legitimate defense. * * *
>
> * * * * *
>
> Any act of war aimed indiscriminately at the destruction of entire cities or of extensive areas along with their population is a crime against God and man himself. * * *

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[2] Petitioner stated that he accepted "the teaching of his Holiness Pope Paul VI as announced in the Pastoral Constitution as binding upon [his] conscience * * *" (N. App. 10).

The application went on to state that, prior to his induction, petitioner had his "own convictions about the war in Vietnam," but determined that "before making any decision or taking any type of stand on the issue [he] would permit [himself] to see and understand the Army's explanation of its reasons for violence in Vietnam (N. App. 11). Upon completion of his infantry training, he concluded that any contribution to the war in Vietnam would violate his "own concepts of natural law," would "[go] against all that [he] had been taught in [his] religious training," and would be "in contravention of [his] own conscience and [his] moral beliefs" (N. App. 11–12). The application further stated (N. App. 12):

> I cannot personally believe that by being in Vietnam we are helping the people there as we say. Have you ever stopped to think all the harm we have brought to that country? We, as being there, are not only destroying their homes, but also are taking the lives of people who were brought up on the very soil who are fighting to preserve their beliefs. We are depriving the individual of the right to live, if we feel he or she is a threat to a village. In Vietnam the individual soldier has the power to kill anyone whom he thinks is wrong.

The application expressed the view that petitioner's duty in the Fort Ord (California) Hospital did not constitute "a direct participation in the war in Vietnam" (N. App. 13) but that petitioner would "refuse duty as a clerk or medical corpsman in Vietnam as [he] would refuse infantry combat duty in Vietnam" (*ibid.*).

He would, however, still be "prepared to perform noncombatant hospital service in the United States because such service is not directly in aid of the Army forces in Vietnam" (N. App. 14). At the end of his application, petitioner added, without any elaboration, that at present he "could not conceive participation in any war." (N. App. 14).

Petitioner was afforded the opportunity to express his beliefs orally at a hearing. The hearing officer found that he was an extremely devout Catholic who sincerely believed that the Vietnam war was wrong (N. App. 38). The officer directed particular attention to petitioner's statements of his conclusions as to the United States' role in Vietnam (*id.* at 38–39):

> [Petitioner] is overly concerned with the type of war, not war itself. He is sincerely opposed to violence but it seems that he can in good conscience accept some "types" of war.
>
> * * * * *
>
> PFC Negre is of the belief that the Vietnam war is immoral and indiscriminate. He adopts the conclusions of Pope Paul VI [in the pastoral Constitution, relevant portions of which are set out *supra*, p. 6], but makes his own judgment as to what is indiscriminate and what is aggression.[3]

The hearing officer thus recommended that the application for discharge be rejected (N. App. 39) because

[3] The hearing officer further noted that Negre "stated that he would serve in the United States in a noncombatant status if the United States was attacked. He would not carry a weapon, but he would assist in some other capacity as long as his support was indirect (N. App. 39).

in his opinion "the applicant is objecting to a particular war" (N. App. 39).

The Department of the Army rejected the application for discharge, finding (N. App. 41) that:

> Applicant's objection to service [is] based upon a personal moral code which causes him to object to the war in Vietnam specifically and which disqualified him for separation on the grounds of conscientious objection.

Negre then filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California.[4] The court denied relief after finding a basis in fact to support the Army's conclusions. The court of appeals affirmed, holding that "[b]eyond question, there was a basis in fact" (N. App. 51) for the conclusions of the Department of the Army. It pointed out (*ibid.*):

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[4] Petitioner Negre is no longer on active duty in the Army, having been transferred to Ready Reserve status. By his own statements, his conscientious views allow him to serve in the military so long as he need not serve in Vietnam, and it was only because he faced Vietnam duty that he sought discharge. His present reserve duty is not in conflict with his expressed views; the possibility that he would ever be reactivated and ordered to Vietnam is highly remote. Under the circumstances, if petitioner were now to file a petition for habeas corpus, for the first time, the matter would lack the ripeness it had when habeas corpus was sought and the petition for a writ of certiorari was filed in this Court. However, as we read *Sibron* v. *New York*, 392 U.S. 40, and *Carafas* v. *LaVallee*, 391 U.S. 234, the continuing remote contingency of Vietnam service may prevent the matter from now being considered moot under the circumstances of this case.

> [Petitioner] objects to the war in Vietnam, not to all wars. * * * He does not express an objection to the nation's military activities in Korea, Japan, West Germany and other parts of the world. Nor does he object to what he terms non-combatant duty in the Army in the United States. Clearly, his views are completely inconsistent with an objection to "war in any form." * * *

SUMMARY OF ARGUMENT

I

Section 6(j) of the Military Selective Service Act of 1967 exempts from combatant training and service those persons who by reason of religious training and belief are opposed to war in any form. This provision has been incorporated in regulations promulgated by the various Armed Services to benefit the in-service conscientious objector to all wars who seeks discharge from the military.

The historical evolution of the statutory exemption reflects a clear congressional intent to accommodate only those persons who consider any and all wars as contrary to the principles of their religion—whatever form that religion may take. It was not intended to reach, and has never been construed so broadly as to reach, the individual who conscientiously opposes the particular war of the moment, no matter how sincere his objection or religious his motivation.

II

Exemption from military service is not required by the Constitution but is solely a matter of legisla-

tive grace. Congress, in drawing the line between conscientious objectors to all wars and the "selective" objector to a particular war, recognized that the two objections were by nature qualitatively different. It is one thing to frame legislation so as to accommodate individuals whose beliefs, based in religion or the equivalent, categorically forbid killing in war; it is quite another to defer to their varied personal judgments on national policy based on the same political, sociological and economic factors that the government necessarily considered in reaching its decision to wage a particular war. Compelling reasons of general policy support Congress' decision not to follow the latter course. Neither the purpose nor the effect of the legislation runs counter to the constitutional requirements of the Establishment Clause of the First Amendment.

Nor can it reasonably be maintained that, in deciding to require military service of one who might be sent to an area where in conscience he does not believe American troops should be, Congress has violated the Free Exercise Clause of the First Amendment. However untrammeled may be the freedom to believe, religious freedom does not require that religious scruples be recognized as justifying disobedience to a valid law. There are numerous areas in which citizens can state that, as a matter of conscience based in religious principles, they object to political decisions of the government. But that cannot permit such religiously derived views to prevail over national policy and justify non-compliance with the law. Such is the

case here. Only if the Free Exercise Clause is broadened to encompass a general right of conscience to object to and refuse to comply with specific governmental policies could it require exemption of those who, on the basis of some religious motivation, hold a "selective" conscientious objection to participation in a particular war. And so to construe that provision would logically lead to a situation destructive of orderly government, since it would of necessity extend beyond the Selective Service context and reach other governmental policies as to which an individual claimed, as a matter of religious motivation, to be conscientiously opposed.

Plainly, Congress acted within the permissible range of legislative judgment in drawing the line in Section 6(j) on the basis of the qualitative difference between those who assert an unalterable "religious" opposition to killing in any war and those whose scruples against a particular war necessarily depend upon social or political considerations. The classification involved is not irrational, arbitrary or capricious in violation of the equal protection concepts of the Fifth Amendment. While Congress could, of course, determine to draw the line elsewhere, that is a matter for Congress in the exercise of the power, expressly granted it in the Constitution, to raise and support armies.

ARGUMENT

I. SELECTIVE CONSCIENTIOUS OBJECTORS DO NOT MEET THE STATUTORY QUALIFICATIONS FOR EXEMPTION OR DISCHARGE FROM SERVICE

Section 6(j) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. V) 456(j)) exempts from "combatant training and service in the armed forces" any person found by his local board to be "by reason of religious training and belief * * * conscientiously opposed to participation in war in any form." Such persons remain subject to the draft but are assigned to noncombatant service, or, if their religious beliefs require, to forms of civilian service outside the armed forces. 50 U.S.C. App. (Supp. V) 456(j)).[5]

While this provision has direct application only to claims asserted prior to induction, post-induction claims of conscientious objection to war in any form are provided for in Department of Defense Directive No. 1300.6 (May 10, 1968), which declares:

> IV A. *National Policy* * * * [t]he Congress * * * has deemed it more essential to

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[5] Both petitioners in these cases assert, by the nature of their claims (refusal of induction by Gillette, request for discharge by Negre), that their selective conscientious objections entitle them to complete freedom from military service. Gillette's statements in support of his claim to the local board were consistent with such a position (see pp. 3–4, *supra*); Negre's supporting statements may be read as consistent only with a claim for noncombatant service while remaining in the military (see pp. 6–8, *supra*). In our argument we do not distinguish between claims to total exemption and claims for noncombatant (I-A-O) military service, since we believe that a selective objector does not have the kind of conscientious scruples that are prerequisite to either claim.

> respect a man's religious beliefs than to force him to serve in the Armed Forces and accordingly has provided that a person having bona fide religious objection to participation in war in any form (I–0 classification) shall not be inducted into the Armed Forces * * *
>
> IV B. *DOD Policy.* Consistent with this national policy, bona fide conscientious objection * * * by persons who are members of the armed forces will be recognized to the extent practicable and equitable. Objection to a particular war will not be recognized.

Pursuant to this mandate, the various branches of the Armed Services have promulgated regulations applicable to in-service objectors which incorporate the statutory exemption of Section 6(j) and the attendant decisional law construing it.[6] In essence, then, it is the construction and validity of Section 6(j) that is at issue in both of the present cases—directly in *Gillette* and by incorporation in *Negre*.

Once again this Court is called upon to examine the legislative history of the exemption provision, this time to ascertain whether Congress intended it to

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[6] DOD Directive No. 1300.6 further states that, "[s]ince it is in the national interest to judge all claims of conscientious objection by the same standards, whether made before or after entering military service, Selective Service System standards used in determining I–0 or I–A–O classification of draft registrants prior to induction shall apply to servicemen who claim conscientious objection after entering military service." See Army Regulations AR 635–20 (January 1, 1970) and AR 135.25 (June 1, 1969); Navy Department BUPERINST 1900–5 (July 18, 1968); Air Force Regulation AFR 35–24 (March 25, 1969); Marine Corps Order MCO 1306.16B (June 18, 1969); Coast Guard COMDTINST 1900.2 (October 7, 1968).

have application to those conscientiously opposed to participation in only the particular conflict of the moment, or, instead, envisaged its coverage as limited to persons whose "religious" conscientious objection,[7] extends to participation in all wars in any form. The historical evolution of Section 6(j) was traced in detail in the government's brief in *United States* v. *Seeger*, No. 50, O.T. 1964, pp. 41–60, reprinted in the government's Supplement to its brief in *Welsh* v. *United States*, No. 76, O.T. 1969, pp. 26A–45A, and we do not repeat it here.[8] It suffices to point out that from the early days of our republic to the present time, the legislative purpose, as stated in a resolution of the Continental Congress in 1775, has been to honor the consciences of those "who from Religious Principles cannot bear Arms in any case." *Selective Service System Monograph* No. 11, *Conscientious Objection* (1950), pp. 33–34. Never, in all the years in

[7] We do not view the decisions of this Court in *United States* v. *Seeger*, 380 U.S. 163, and *Welsh* v. *United States*, 398 U.S. 333, as reading out of the statute the requirement that a conscientious objection to war must be founded on "religious training and belief." As we read those opinions, while one's beliefs "need not be confined in either source or content to traditional or parochial concepts of religion" (398 U.S. at 339), they still must be "religious" in the registrant's "own scheme of things" (380 U.S. at 185; 398 U.S. at 339). Thus, they must occupy "'a place parallel to that filled by * * * God' in traditionally religious persons" and "function as a religion in [the registrant's] life" (380 U.S. at 185; 398 U.S. at 340). It is thus not enough if one's conscientious objection "rests solely upon considerations of policy, pragmatism, or expediency" (398 U.S. at 340–341).

[8] Counsel for both petitioners have been furnished copies of our *Seeger* brief and our *Welsh* supplemental brief.

which Congress has recognized conscientious objection as a basis for exemption from military service has it extended the privilege to persons other than those who were total pacifists—that is, opposed to all forms of war.[9]

In this regard, the language of the present statute is unambiguous. It requires in specific terms a religious conscientious objection to "participation in war in any form." Petitioners urge that the phrase "in any form" be construed to modify the word "participation" and not the word "war." Had Congress so intended, however, provision in the same section for possible induction and assignment to "noncombatant service" of persons found to be conscientious objectors would have had little meaning, for such persons, under petitioners' reading of the statute, would be exempt by definition from any form— combatant or noncombatant—of participation. Moreover, even without regard to the modifying phrase, the meaning of Section 6(j) remains plain, since the term "war" is used in its generic sense, only those who object to "participation in war" are covered. No shuffling of words can alter the thrust of the Act of

[9] We note that while the World War I Act was under consideration, the Senate rejected an amendment which would have granted exemptions "[o]n the ground of a conscientious objection to the undertaking of combatant service in the present war" 55 Cong. Rec. 1474, 1478. Senator LaFollette, the principal proponent of the bill admitted that the intent and effect of his proposal was to excuse those persons of German and Austrian ancestry who had "conscientious objections" against going "into the service to fight against their own kith and kin * * *." *Id.* at 1476.

having application only to those conscientiously opposed to war generally, in the historical sense of having a religious objection to the concept of bearing arms under any circumstances (see our *Welsh* supplement, *supra,* pp. 26A–34A).[10]

To construe this provision, as petitioners necessarily urge, as an exemption from *all* combatant training for conscientious objectors not unwilling to bear arms generally but opposed to doing so with respect to a particular conflict, stretches the congressional language beyond its breaking point.[11] Ample support for this

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[10] In the article by then Dean Stone, *The Conscientious Objector*, 21 Columbia Univ. Q. 253, on which petitioners seem to place considerable reliance, the frame of reference was not the "selective" objector (*id.* at 267). During World War I, the exemption not only had no application to selective objectors, but, indeed, was limited in its coverage to members of historic peace churches. See also the concurring opinion of Mr. Justice Cardozo, joined by Justices Stone and Brandeis, in *Hamilton v. Regents*, 293 U.S. 245, 265, 266–267.

[11] Petitioner Gillette argues that "[s]ince individuals like Gillette are not being faced with an invasion of the United States or a United Nations sanctioned war or World War II, the fact that their consciences would allow them to fight in these wars should not be sufficient to deny them conscientious objector status with respect to the war they are being faced with, namely the Vietnam War" (Gillette Brief p. 10). However, a person entering military service today is not necessarily "faced with" the Vietnam war. His duty of service potentially may be needed in other places during any given term of service. Thus, the broader inquiry as to a person's feelings about all wars is pertinent and necessary in practical terms, as well as being mandated by the fact that Congress did not intend that a "selective" objector be exempt from combatant or noncombatant training generally because he is opposed to a particular war.

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other grounds *sub nom. Gio*
394 U.S. 310. And it has been
to the present statute. See
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fight in a possible "theo-
mand of Jehovah "with-
U.S. at 390–391), was
se (*id.* at 391):

> * * * Congress had in mind real shooting wars when it referred to participation in war in any form—actual military conflicts between nations of the earth in our time—wars with bombs and bullets, tanks, planes and rockets.

As to this "type" of war, it is implicit in the Court's language that a conscientious objection, on religious grounds, must under the terms of the statute be absolute.[12] See also *Taffs* v. *Unied States*, 208 F. 2d 329, 331 (C.A. 8), certiorari denied, 347 U.S. 928. Indeed, as recently as last term in *Welsh* v. *United States*, 398 U.S. 333, this Court, despite differences on other aspects of the challenged provision, was unanimous in expressing the issue under Section 6(j) as opposition to "participating in any war at any time." 398 U.S. at 340, 342; *id.* at 347, 357 (Harlan, J., concurring); *id.* at 369–370 (White, Burger and Stewart, JJ., dissenting). Cf. *Witmer* v. *United States*, 348 U.S. 375, 381.

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[12] Chief Justice Hughes, dissenting in *United States* v. *MacIntosh*, 283 U.S. 605, 627, expressed the opinion (*id.* at 635) that an alien conscientiously opposed on religious grounds to bearing arms, either generally or selectively, should not be denied citizenship or the right to hold public office where he is unable for that reason alone to take the oath (Nationality Act of 1940, 54 Stat. 1157) to "support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." *Id.* at 630. The rationale, later adopted by the majority of the Court in *Girouard* v. *United States*, 328 U.S. 61, 64, was simply that "[t]he oath required of aliens does not in terms require that they promise to bear arms," and thus the "[r]efusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our institutions." Though petitioners take comfort in the fact that Chief Justice Hughes did not in

No case relied on by petitioners has interpreted the *statute* otherwise, nor are we aware of any judicial decision which reads into the questioned language an exception for "selective" conscientious objectors. Most of those said to contain dictum suggesting such a construction represent nothing more than a reaffirmation of the *Sicurella* rationale[13] (*United States* v. *Haughton*, 413 F. 2d 736, 742 (C.A. 9); *United States* v. *Purvis*, 403 F. 2d 555 (C.A. 2)) or a variant of the settled principle that a willingness to use force in self-defense or in defense of one's home and family is not inconsistent with a conscientious objector claim. *United States* v. *James*, 417 F. 2d 826, 831 (C.A. 4); *United States* v. *Carroll*, 398 F. 2d 651, 655 (C.A. 3); and see *Sicurella* v. *United States*, *supra*, 348 U.S. at 389. Even the few cases granting an exemption despite the objector's acknowledgment that "it was possible" he would fight if the country was invaded (*United States* v. *Owen*, 415 F. 2d 383, 390 (C.A. 8); *Miller* v. *Laird*, No. C–70328, AJZ, N.D. Calif., decided April 28, 1970) were careful to emphasize that since the

MacIntosh distinguish between total pacifists and "selective" religious objectors in concluding that alien conscientious objectors can qualify for citizenship and for public office (*id.* at 635), that has little bearing on the present case. There the question was whether a person unwilling to bear arms in what he considered to be an "unjust" war could, *under the language of the loyalty oath*, still qualify for citizenship or public office; it was not whether such persons could also qualify for an exemption from "combatant training and service" under statutory language requiring a religious conscientious objection to "participation in war in any form." As to the latter, Chief Justice Hughes was careful to express no opinion.

[13] See cases cited at p. 27, n. 4 of petitioner Gillette's brief.

claimant was *then* conscientiously "opposed to participation in all war," his claim should not be denied because of a statement which "relates to a contingency and provides no inference to [his] state of mind when the incident occurred." [14] 415 F. 2d at 390; and see *Miller* v. *Laird, supra.*

On this background, the relevant language of Section 6(j) (and hence of the military regulations governing Negre's request for discharge) lends itself to but one interpretation—that exempt status depends on a "religious" conscientious objection to participation in any shooting war in any form. Since Congress has determined so to circumscribe the exemption, it remains only for this Court to ascertain whether that legislative judgment runs afoul of some constitutional command. Notwithstanding recent district court decisions to the contrary (*United States* v. *Sisson*, 297 F. Supp. 902 (D. Mass.), appeal dismissed for lack of jurisdiction, 399 U.S. 267; *United States* v. *McFadden*, 309 F. Supp. 502 (N.D. Cal.), pending on jurisdictional statement, No. 422, this Term, *United States* v. *Bowen*, Cr. No. 42499, N.D. Cal., decided December 24, 1969), we submit that it does not.

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[14] In *Fleming* v. *United States*, 344 F. 2d 912 (C.A. 10), while the registrant apparently possessed what could be characterized as "selective" views, the court considered him "to be conscientiously opposed to participation in war in any form" (*id.* at 916) and thus did not focus on this aspect of the case. Rather, the issue turned on whether Fleming's opposition was motivated "by reason of religious training and belief" within the meaning of *Seeger*.

II. A SELECTIVE CONSCIENTIOUS OBJECTOR HAS NO CONSTITUTIONAL RIGHT TO EXEMPTION FROM COMBATANT SERVICE IN VIETNAM

Under the Constitution, the authority to determine whether or not this country needs a particular individual's services in the Armed Forces is vested in the Congress. See *United States* v. *O'Brien,* 391 U.S. 367, 377; *Lichter* v. *United States,* 334 U.S. 742, 755-758. In exercising its broad grant of power "[t]o raise and support Armies" (Art. I, Sec. 8), Congress may lawfully conscript for military service either in time of peace or war. *United States* v. *O'Brien,* 391 U.S. 367, 377; *Selective Draft Law Cases,* 245 U.S. 366. To be sure, Congress may not act in a way which impairs religious freedom or establishes a religion in violation of the First Amendment; nor may it arbitrarily discriminate between persons or classes in violation of the due process clause of the Fifth Amendment. But Congress has done neither in limiting the scope of Section 6(j) to those opposed to war "in any form".

Religious freedom does not require that religious scruples be recognized as justifying disobedience to a valid law. *Cantwell* v. *Connecticut,* 310 U.S. 296, 303; *Jacobson* v. *Massachusetts,* 197 U.S. 11, 29; *Prince* v. *Massachusetts,* 321 U.S. 158. And, as we shall show, neither the principles of religious neutrality, nor those of equal protection more generally, invalidate the congressional decision to excuse only those who are opposed to participation in war in any form (50 U.S.C. App. (Supp. V) 456(j)). Because the Constitution requires no exemption at all (*In re*

Sommers, 325 U.S. 561),[15] it is apparent, as expressly noted by this Court in *Hamilton* v. *Regents*, 293 U.S. 245, 264, quoting with approval from *United States* v. *MacIntosh*, 283 U.S. 605, 623–624, that:

> The conscientious objector is relieved from the obligation to bear arms * * * only because, it has accorded with the policy of Congress thus to relieve him. * * * The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution but from the acts of Congress. * * * [T]he war powers * * * include * * * the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general.* * *

A

In granting the exemption only to those opposed to war generally, Congress sought to accommodate, rather than to establish, religion. It chose to recognize that group of persons who for reasons of conscience reject killing as an instrument of national policy for all situations, and, in deference to their religious beliefs, to spare them the hardship that would result if they were required to perfom military service. The scope of Section 6(j) was as recently as last term, in *Welsh* v. *United States*, 398 U.S.

[15] As Mr. Justice Harlan stated in his separate opinion in *Welsh* v. *United States*, *supra*, 398 U.S. at 356, "Congress, of course, could entirely consistently with the requirements of the Constitution, eliminate *all* exemptions for conscientious objectors."

333, construed by this Court in just such a way as to meet the "'benevolent neutrality'' standard of the First Amendment (*Walz* v. *Tax Commission,* 397 U.S. 664, 669). As a consequence, all persons who are in a broad sense "religiously" opposed to war in any form are entitled to the exemption, whether their views be a matter of church doctrine, nontheistic religious teaching or individual conscience independently developed. No religion is favored; none is discriminated against; none is established.

That Congress drew the line between the conscientious objector to all wars and the "selective" objector to a particular war in no way suggests a religious preference. The underlying purpose of the legislative decision, to which we must look (*Abington School District* v. *Schempp,* 374 U.S. 203, 222), is to recognize a qualitative difference between general and selective objection without regard to religion.[16] Opposition to a particular war necessarily involves a political judgment,[17] an individual conclusion that the policy

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[16] Since Congress has chosen to make no distinction between religious and non-religious "selective" conscientious objectors, denying exemption to both, it has avoided the question that would arise under the Establishment Clause if Section 6(j) were read to include "religious" selective objectors, but did not include non-religious selective objectors. See *Welsh* v. *United States, supra,* 398 U.S. at 356–361 (Harlan, J., concurring). That problem is, however, suggested by Negre's Brief in No. 325, insofar as it argues that he is entitled to special treatment on account of a Catholic "unjust war" precept.

[17] See generally, Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace,* 54 Va. L. Rev. 1355, 1374–1376 (1968).

adopted by the duly elected government is wrong at a certain time in relation to a particular area of operations. See *United States* v. *Kauten, supra,* 133 F. 2d at 707. While the personal response to that determination may well be religiously and conscientiously motivated, it rests in the first instance on a decision that is political and particular. See generally, Comment, 34 U. Chi. L. Rev. 79, 102 (1966).[18] In contrast, those who conscientiously oppose participation in combat in any form do not invoke the same type of contemporary political judgment. Their actions are not motivated by weighing the objectives of a governmental decision to wage war, nor by determining independently whether a war is just or unjust, the enemy good or bad. Their rejection of war in any form is on a different level; it is based, rather, on inherent general characteristics of military combat, on the cardinal moral tenet that it is wrong to kill for any purpose at any time.[19]

It is one thing to frame legislation so as to accommodate individuals whose beliefs, based on religion or the equivalent, categorically forbid killing in war; it is quite another to defer to their varied personal

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[18] Thus, for example, Negre's objection to the Vietnam war, though said to be derived from religious doctrine, depends upon "his own judgment as to * * * what is aggression" (p. 8, *supra;* Negre Brief p. 11); and Gillette's objection is to "this unnecessary and unjust war" (p. 4, *supra*).

[19] This, of course, recognizes the fact that belief in the use of self-defense, as well as defense of home, family and associates is not inconsistent with a conscientious objection to war in any form. See *supra*, p. 20; and see *Sicurella* v. *United States*, *supra*, 348 U.S. at 391.

judgments on national policy based on the same political, sociological and economic factors that the government necessarily considered in reaching its decision to wage a particular war. See generally, Comment, 34 U. Chi. L. Rev. 79, 102, (1966). Without regard to the source of such a selective objection—whether religious in a narrow or broad sense or otherwise—there are compelling reasons of general policy for not establishing such an exemption from military service. Most fundamentally, any such exemption—based as it would necessarily be upon changeable political judgments of the moment—would be inconsistent with the concept of uniform, and hence fair, principles of exemption. Assuming (as we do in these cases) the sincerity of the particular individual's feelings, there would remain real problems in defining just what kind of selective objection is sufficient to warrant exemption either from all service or from combatant service. Unlike the statement "I cannot in conscience participate in any war", the statement "I cannot in conscience participate in this war" has no fixed meaning and can reflect a changeable spectrum of subjective feelings. For example, the individual may object to what he conceives to be the underlying "purpose" of the United States' combat operations in Vietnam, but that "purpose" may or may not have changed over the years; would such an objection properly justify a refusal to participate in the process of withdrawal from Vietnam? Or the individual may object not to the "purpose" but rather to the use of particular weapons or techniques, or

to the political coloration of the United States' allies. The range of possible views is broad, and both the matters to which the individual may object and his attitude toward them are subject to change from day to day. The further question would arise as to the circumstances under which a selective objection would warrant a complete exemption from military service rather than simply assignment to noncombatant duties or, perhaps, to a noncombat zone;[20] again, the problem would be much more intricate than in the case of the categorical objector, as to whom the alternatives are simply (1) whether his objections are only to personal participation in any war, or (2) whether they categorically forbid any service in support of the military.

Unless the Selective Service System and the military are to be required to defer to any individual's unexplained assertion (on sincere "religious" grounds) that he chooses not to serve at all at the present time or that he chooses not to enter combat, we cannot see how exemptions for selective objectors could be administered uniformly and fairly without exploration, in each case, into the matters we have

[20] Does the First Amendment contain a right, as petitioner Negre claims, to be discharged from the service merely because he opposes combat service in Vietnam, even though he could apparently in good conscience continue to serve in the army? Can petitioner Gillette validly assert his objection to the fighting in Vietnam as a defense to a refusal to submit to induction generally, when his duty may never involve Vietnam service?

suggested.[21] Such inquiries would inevitably be vexatious if not impossible to conduct with any hope of reaching fair and consistent results in each case. And apart from these more fundamental concerns, the purely administrative problems and delays that would arise would necessarily hinder the achievement of the basic objective of the Selective Service System—to raise necessary military manpower for the national defense (cf. *Falbo* v. *United States,* 320 U.S. 549, 553; *Estep* v. *United States,* 327 U.S. 114, 137 (Frankfurter, J., concurring); *Oestereich* v. *Selective Service Board,* 393 U.S. 233, 241 (Harlan, J. concurring); *Clark* v. *Gabriel,* 393 U.S. 256, 258–259).

These considerations, all secular rather than religious, (see *Abington School District* v. *Schempp,* 374 U.S. 203, 222; *Board of Education* v. *Allen,* 392 U.S. 236, 243), provide ample basis for the legislative judgment to excuse only those persons whose beliefs cause them to oppose participation in all wars and not those persons who assert the right to choose the war in which they will fight. Petitioners have failed to show, as they cannot, an "absence of any substantial legislative purpose other than a religious one" for so

[21] These difficulties would, of course, be added to the difficulties we have already suggested of determining in each case whether one seeking an exemption on grounds of a "selective" objection to a particular war sincerely reached his political judgment that the war is unjust for reasons that are religiously motivated (however broadly "religion" is defined) rather than based *solely* on political, sociological and economic considerations. See generally Smith and Bell, *The Conscientious-Objector Program—A Search for Sincerity,* 19 U. Pitt. L. Rev. 695 (1958).

delineating the exemption. *McGowan* v. *Maryland,* 366 U.S. 420, 468 (Frankfurter, J., concurring). There is, of course, as Mr. Justice Brennan pointed out in his separate opinion in *Schempp, supra,* 374 U.S. at 295, "nothing in the Establishment Clause [that] forbids the application of legislation having purely secular ends in such a way as to alleviate burdens upon the free exercise of an individual's religious beliefs." Congress has sought to do no more here; "[t]he constitutional [obligation of] neutrality * * * 'is not so narrow a channel' " that it will not accommodate a legislative judgment based upon the qualitative difference between general and selective conscientious objections that is clearly definable without discrimination among or even reference to matters of religious belief. *Walz* v. *Tax Commission,* 397 U.S. 664, 669.

B

Nor can it reasonably be maintained that, in deciding to require service of one who might be sent to an area where in conscience he does not believe American troops should be, Congress has violated the Free Exercise Clause of the First Amendment. As already pointed out, there is no constitutional right to exemption from military service; that right is accorded to those who conscientiously object to all wars solely as a matter of legislative grace. See *Welsh* v. *United States, supra,* 398 U.S. at 356 (Harlan, J., concurring). In his separate opinion in *Hamilton* v. *Regents,* 293 U.S. 245, 268, Mr. Justice Cardozo, joined by Justices Stone and Brandeis, recognized that extreme

deference to a conscientious objector's claim of religious liberty might well lead to wholly incongruous situations:

> Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end, to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.

Most religions (and their humanistic equivalents) recognize that there are areas in which individual conscience governs the application of religious (or humanistic) doctrine to particular circumstances. Accordingly, there are numerous areas in which citizens can state that, as a matter of conscience based in religious principles, they object to political decisions of the government, just as petitioners do here.[22] But

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[22] The Catholic religion, for one, teaches that conscience in representing God has more right to be obeyed than any law contrary to conscience (Pope John XXIII, *Pacem in Terris*, page 142a, April 11, 1963): "Since the right to command is required by moral order and has its source in God, it follows that, if civil authorities legislate for or allow anything that is contrary to that order and therefore contrary to the will of God, neither the laws made nor the unauthorizations granted can be binding on the consciences of the citizens of US, since God has more rights to be obeyed than man" (N. App. 9–10). Nor is such

that cannot permit such religiously derived views to prevail over national policy and justify non-compliance with the law. Moral conviction derived from political judgment may well justify civil disobedience in the mind of the lawbreaker, but it is not a valid defense to breaking the law. And this must be true whether or not the law thought to be unjust requires an affirmative act. Compare *United States* v. *McFadden, supra; United States* v. *Bowen, supra.* A person cannot lawfully refuse to pay taxes because he conscientiously believes it is wrong or irreligious to contribute to an unjust war. Nor can he escape affirmative registration requirements of the Selective Service System because they are not consonant with his religious conscientious objector belief. See *United States* v. *Henderson,* 180 F. 2d 711, 713–716 (C.A. 7).

Only if the Free Exercise Clause is broadened to encompass a general right of conscience to object to and refuse to comply with specific governmental policies could it require the inclusion of those who, on the basis of some "religious" motivation, hold a "selec-

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belief in freedom of conscience confined to Catholicism. It applies with equal force both to theistic and nontheistic religions. See generally *amicus* briefs submitted by representatives of the following religions: Baptist, Jewish, Lutheran, Presbyterian, Quaker, American Ethical Union, Church of the Brethren, Disciples of Christ, United Church of Christ, Reformed Church in America, and also the interdenominational National Council of Churches. There are strong suggestions in the briefs that the role ascribed to individual conscience by the various religions are quite similar. There is also some suggestion that religions other than Catholicism also recognize a distinction among wars.

tive" conscientious objection to participation in a particular war.[23] And if that provision is given such a sweeping scope, it would of necessity extend beyond the Selective Service context and reach untold other governmental policies as to which an individual claimed, as a matter of religious motivation, to be conscientiously opposed. Such a construction of the First Amendment would be destructive of the orderly functioning of government and would undermine the essential integrity of the democratic process.

Thus, if the legislative determination that the "selective" objector must serve in the military be deemed to impinge on the free exercise of his "religious" beliefs, it is a permissible intrusion under the standards enunciated by this Court in *Sherbert* v. *Verner,* 374 U.S. 398, 406–407.[24] The compelling interest that warrants any such intrusion is not merely one of administrative convenience or the need for some degree of certainty in providing necessary military manpower, though these, of course, are relevant and important considerations to our national security. See generally, Clark, *Guidelines For the Free Exer-*

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[23] Language purporting to protect a general "right of conscience" was in fact included in early drafts of the Bill of Rights, but was eliminated from the provisions finally adopted and submitted to the States for ratification. See Russell, *Development of Conscientious Objector Recognition in the United States*, 20 Geo. Wash. L. Rev. 409, 416–417 (1952).

[24] We note further that there is not here any such discrimination among religions as the Court adverted to in *Sherbert* in noting that South Carolina law made specific provision for Sunday worshippers as distinguished for Sabbatarians (374 U.S. at 406). See pp. 33–34 *infra.*

cise Clause, 83 Harv. L. Rev. 327, 330–336, 349. Nor is it limited to the interest in uniform, and hence fair, administration of the draft laws. Congress also has a responsibility to preserve the governmental integrity by not allowing political dissent, no matter how sincerely and religiously motivated, to excuse a person from the duties lawfully imposed by the government on all persons in the same class. In achieving this end by limiting the draft exemption to those opposed to "war in any form," Congress has successfully "chart[ed] a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion." *Walz* v. *Tax Commissioner, supra,* 397 U.S. at 672.[25]

C

What we have already said adequately answers the further contention that the legislative distinction between categorical and selective conscientious objectors amounts to arbitrary or invidious discrimination in violation of the equal protection concepts of the Fifth Amendment. Plainly, Congress was within the permissible range of legislative judgment in drawing the line on the basis of the qualitative difference between those who assert an unalterable "religious" opposition to killing in any war and those whose scruples against a particular war necessarily depend, as we

[25] This Court recognized in *Walz*, 397 U.S. at 673, that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the non-interference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself."

have shown, upon social or political considerations of the moment. Congress could, of course, determine to draw the line as petitioners suggest, but that is a matter for Congress in the exercise of the power, expressly granted it in the Constitution, to raise and support armies.[26]

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[26] The majority of the National Advisory Commission on Selective Service in its suggestions to the President voted to "retain the present requirement of the statute, that conscientious objection must be based on moral opposition to war in all forms." (Report of the National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?* p. 50 (1967). The majority concluded (*ibid.*): "[T]he status of conscientious objection can properly be applied only to those who are opposed to all killing of human beings under any circumstances. It is one thing to deal in law with a person who believes he is responding to a moral imperative outside of himself when he opposes all killing. It is another to accord a special status to a person who believes there is a moral imperative which tells him he can kill under some circumstances and not kill under others." The Commission majority was of the opinion that "so-called selective pacifism is essentially a political question of support or nonsupport of a war and cannot be judged in terms of special moral imperatives. Political opposition to a particular war should be expressed through recognized democratic processes and should claim no special right of exemption from democratic decisions" (*ibid*). The majority also expressed concern that "legal recognition of selective pacifism could open the doors to a general theory of selective disobedience to law, which could quickly tear down the fabric of government; the distinction is dim between a person conscientiously opposed to participation in a particular war and one conscientiously opposed to payment of a particular tax." (*ibid.*) The majority concluded also "that a legal recognition of selective pacifism could be disruptive to the morale and effectiveness of the Armed Forces. A determination of the justness or unjustness of any war could only be made within the context of that war itself. Forcing upon the

CONCLUSION

For the reasons stated, the judgment of conviction in No. 85, and the denial of the petition for habeas corpus in No. 325, should be affirmed.

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individual the necessity of making that distinction—which would be the practical effect of taking away the Government's obligation of making it for him—could put a burden heretofore unknown on the man in uniform and even on the brink of combat, with results that could well be disastrous to him, to his unit and to the entire military tradition. No such problem arises for the conscientious objector, even in uniform, who bases his moral stand on killing in all forms, simply because he is never trained for nor assigned to combat duty" (*id.* at pp. 50-51).

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